No. 17-654

# In the Supreme Court of the United States

ERIC D. HARGAN, ACTING SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS

*v.*

ROCHELLE GARZA, AS GUARDIAN AD LITEM TO UNACCOMPANIED MINOR J.D.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## REPLY BRIEF FOR THE PETITIONERS

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Respondent's brief in opposition is most remarkable for what it does not say. Respondent does not dispute that, after the lower courts ruled late in the afternoon of Tuesday, October 24, Ms. Doe's representatives told the government that Ms. Doe would receive counseling from a new doctor on the morning of October 25, with the abortion to follow on October 26; and that, in reliance on those representations, the government informed respondent's counsel it would file a stay application the morning of October 25, rather than late at night on October 24. Respondent is noticeably silent on what happened next. She does not deny that, after the government's notice, Ms. Doe's representatives secured the services of the original doctor and changed the na-

ture of Ms. Doe's appointment without telling the government.[1] Nor does respondent deny that these actions were a deliberate effort to prevent this Court's review. Respondent contends only that, as a legal matter, the conduct should carry no consequences, either with respect to vacating the court of appeals' judgment or disciplining her attorneys. That is incorrect.

First, this is a classic case for vacatur of a decision that was mooted by respondent's conduct on the way to this Court, "'clear[ing] the path for future relitigation' by eliminating a judgment the loser was stopped from opposing on direct review." *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 71 (1997) (citation omitted). The decision issued by the divided en banc court on an important question of constitutional law plainly would have warranted this Court's review, but for the actions of Ms. Doe's representatives. And Ms. Doe's claims for prospective relief became moot when she underwent an abortion. The potential legal consequences to the government of leaving in place the court of appeals' erroneous decision justify this Court's intervention.

Second, this Court historically has been its own judge of whether conduct is "unbecoming a member of [its] Bar," Sup. Ct. R. 8.2, and the conduct here speaks for itself. The Model Rules and ethical principles governing the legal profession, however, lead to the same conclusion. Ms. Doe's representatives may have been free to say nothing about the timing of her procedure. But they could not make repeated representations to

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[1] Although respondent does not explain precisely what happened during the night of October 24 and early morning of October 25, she does not dispute that her counsel were involved or that they were aware of the earlier representations made by Ms. Doe's attorney ad litem and guardian ad litem.

the government (and the courts) about that procedure's timing, know that the government was relying on those statements, act to render the statements false, and then say nothing to correct the falsehood. That is not conduct becoming members of the Bar of this Court.

1. Respondent does not dispute that when an appeal becomes moot "while on its way [to this Court]," the established practice of this Court is to "vacate the judgment below and remand with a direction to dismiss," at least when the appeal otherwise would have warranted further review. *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950); see Pet. 20, 23 n.4; see also *Arave* v. *Hoffman*, 552 U.S. 117, 118-119 (2008) (per curiam) (following the practice where not every claim in the case had become moot). Respondent's arguments for not following that practice here lack merit.

a. Respondent contends (Br. in Opp. 13-14) that the decision below would not have "warranted this Court's review," because the en banc court of appeals resolved only the government's stay motion, not "the merits of Ms. Doe's constitutional claim." That contention is incorrect for two reasons. First, after denying the government's request for a stay, the court remanded the entire case to the district court for further proceedings. Pet. App. 19a. In so doing, the court clearly considered itself to have resolved the entire appeal by effectively affirming the district court's temporary restraining order (TRO). If the court had resolved only the government's motion for a stay pending appeal, the appeal would have remained before the court for a resolution of the merits.[2] Second, the en banc court denied a stay

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[2] Although TROs are generally not appealable, the court of appeals correctly concluded that the district court's order was "more akin to preliminary injunctive relief and [wa]s therefore appealable

for "substantially" the reasons set forth in Judge Millett's panel statement, *ibid.*, which addressed at length the constitutional question, see *id.* at 7a-17a. By adopting Judge Millett's statement, the en banc majority took a position on the merits, and that is exactly how the dissenters understood it. See *id.* at 54a (Kavanaugh, J., dissenting) ("Today's majority decision * * * is ultimately based on a constitutional principle as novel as it is wrong.").

Because respondent misunderstands what the en banc court decided, she similarly misunderstands (Br. in Opp. 15) what question would have been presented for this Court's review. Absent the conduct of Ms. Doe's representatives, the government would have sought an emergency stay from this Court, pending a petition for a writ of certiorari that presented the constitutional question—*i.e.*, whether an unaccompanied alien minor may require the government to facilitate an elective abortion when the minor may leave the government's custody by requesting voluntary departure or identifying a suitable sponsor. See Pet. 17-18. Respondent's contention (Br. in Opp. 15-16) that the constitutional question would not have warranted this Court's review ignores its obvious legal and practical significance and the fact that the court of appeals considered it en banc and was deeply divided over it. See Emergency Pet. for Reh'g En Banc 12 (urging rehearing en banc based on the "exceptional importance" of the issues presented).

In seeming recognition that the merits would have been presented here, respondent addresses them. See Br. in Opp. 15-17. She acknowledges that, "although government may not place obstacles in the path of a

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under 28 U.S.C. § 1292(a)(1)." Pet. App. 19a n.1 (citing *Sampson* v. *Murray*, 415 U.S. 61, 86 n.58 (1974)).

woman's exercise of her freedom of choice, it need not remove those not of its own creation." *Harris* v. *McRae*, 448 U.S. 297, 315-316 (1980). Here, Ms. Doe may take steps to end her federal custody by requesting voluntary departure or by identifying a suitable sponsor. But until she does—unlike for adults in the custody of Immigration and Customs Enforcement or the Bureau of Prisons—the Director of the Office of Refugee Resettlement of the Department of Health and Human Services (HHS) is charged by Congress with overseeing Ms. Doe's care and custody.[3] See 6 U.S.C. 279. In that circumstance, the government should not be required to facilitate an abortion, whatever the level of time, attention, or resources it would have to devote. The en banc majority's contrary conclusion "represents a radical extension of the Supreme Court's abortion jurisprudence." Pet. App. 54a (Kavanaugh, J., dissenting).

Finally, respondent argues (Br. in Opp. 17) that the emergency interlocutory nature of the decision below would have counseled against further review. But this Court reviews interlocutory decisions that turn on the resolution of important legal issues. See, *e.g.*, *Glossip* v. *Gross*, 135 S. Ct. 2726 (2015); *Agency for Int'l Dev.* v. *Alliance for Open Soc'y Int'l, Inc.*, 570 U.S. 205 (2013); *NASA* v. *Nelson*, 562 U.S. 134 (2011). That course would have been particularly appropriate here, given that the "interlocutory" order granted Ms. Doe full relief on the relevant claims. As for the emergency posture, the en banc majority set aside the panel's modest, unpublished order and replaced it with a decision of constitutional law

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[3] At the time that Ms. Doe underwent an abortion, HHS believed it had identified a potentially suitable sponsor. Pet. 6. Ultimately, however, the individual chose not to apply.

in less than 48 hours, without oral argument, and after requiring the government to respond to the rehearing petition literally overnight. Those circumstances would have been more reason, not less, for further review. See Pet. App. 63a (Kavanaugh, J., dissenting).

b. Respondent also contends that Ms. Doe's claims for prospective relief are not moot because they "fall into established exceptions to mootness." Br. in Opp. 18; see *id.* at 17-20. As an initial matter, Ms. Doe's claims regarding access to abortion are not "capable of repetition yet evading review." *Id.* at 19. That exception applies only where "(1) 'the challenged action is in its duration too short to be fully litigated prior to cessation or expiration,' and (2) 'there is a reasonable expectation that *the same complaining party* will be subject to the same action again.'" *Kingdomware Technologies, Inc.* v. *United States*, 136 S. Ct. 1969, 1976 (2016) (emphasis added) (brackets and citation omitted). Here, Ms. Doe—who will turn 18 in January—does not argue that she has a reasonable expectation of becoming pregnant again and requiring another abortion while in HHS custody.

Nor are Ms. Doe's injunctive claims saved from mootness because she filed this case as a putative class action. A class claim can survive after an individual named plaintiff's claim has become moot if the class is certified *before* the individual claim is mooted. See *U.S. Parole Comm'n* v. *Geraghty*, 445 U.S. 388, 398 (1980). Here, however, respondent filed a motion for class certification on October 18, and the district court had yet to rule when Ms. Doe's individual claim became moot on October 24. Pet. 19, 25. Respondent therefore contends (Br. in Opp. 19) that Ms. Doe's putative class claim is not moot because it is "inherently transitory." But that exception applies only where a claim is so fleeting that

"no plaintiff [will] possess[] a personal stake in the suit long enough" to obtain a decision on class certification. *Genesis Healthcare Corp.* v. *Symczyk*, 569 U.S. 66, 76 (2013). As the government has explained (Pet. 26) (and respondent does not dispute), it is far from clear that the district court could not have ruled on *respondent's* motion for certification before Ms. Doe's interest would have expired in the ordinary course—much less that "no plaintiff" in the future would be able to litigate a challenge through a class-certification decision. 569 U.S. at 76.

c. Finally, respondent erroneously contends that the court of appeals' decision will not have any "legal consequences." Br. in Opp. 21-22 (citation omitted). To be clear, we agree that the decision neither establishes law of the case nor has any preclusive effect. See *id.* at 21. But the en banc court's order is a published decision effectively affirming the district court's order that the government immediately facilitate Ms. Doe's obtaining of an elective abortion. Absent vacatur, the decision will be binding within that circuit with respect to future requests for similar preliminary relief, absent any material factual differences,[4] and it plainly will have significant influence on permanent relief in this case and others. These are legal consequences that the government should not, in fairness, be forced to suffer. *Munsingwear*, 340 U.S. at 40-41.

2. With respect to disciplinary action, respondent does not dispute any of the key facts: (i) her counsel indicated to the government and the courts that the doctor available to Ms. Doe during the week of October 23

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[4] The district court already has relied on the decision to afford similar relief to two additional aliens in HHS custody. See Stay Appl. Addendum 144.

was not the doctor who had provided her prior counseling (and thus the new doctor would have to wait at least 24 hours after counseling to perform the abortion under Texas law); (ii) Ms. Doe's representatives *expressly told* the government that, when she did not receive counseling from the new doctor on Tuesday, October 24, she would not be able to undergo an abortion until Thursday, October 26; (iii) respondent's counsel *knew* that the government was relying on those representations when it delayed seeking emergency relief from this Court overnight on October 24; (iv) sometime after the government provided notice of its intent to file on the morning of October 25, Ms. Doe's representatives secured the services of the original doctor; and (v) they made no effort to correct their earlier statements.

Under Rule 8.2, this Court has the authority to "take any appropriate disciplinary action against any attorney who is admitted to practice before it for conduct unbecoming a member of the Bar." That standard is not tied to any State's ethical code or the Model Rules. See *In re Snyder*, 472 U.S. 634, 645 n.6 (1985). Rather, "'conduct unbecoming a member of the bar' is conduct contrary to professional standards that shows an unfitness to discharge continuing obligations to clients or the courts, or conduct inimical to the administration of justice." *Id.* at 645 (interpreting the same language in Fed. R. App. P. 46). If respondent's counsel knowingly allowed the government to rely on statements that either respondent's counsel or Ms. Doe's ad litems deliberately rendered false, such conduct is fairly described as "inimical to the administration of justice."

The Model Rules lead to the same conclusion. Rule 4.1 provides that, "[i]n the course of representing a client a lawyer shall not knowingly * * * make a false

statement of material fact or law to a third person," Model Rules of Prof'l Conduct R. 4.1 (2017), and shall not, at any time, "engage in conduct involving dishonesty, fraud, deceit or misrepresentation," Model Rules of Prof'l Conduct R. 8.4(c) (2017). Although a lawyer "generally has no affirmative duty to inform an opposing party of relevant facts," misrepresentations can occur through "omissions that are the equivalent of affirmative false statements." Model Rules of Prof'l Conduct R. 4.1 cmt. 1 (2017). Even when a lawyer makes a representation he reasonably believes is true when made, an "obligation to disclose * * * ordinarily arises" if the lawyer subsequently discovers the statement to be false. Restatement (Third) of the Law Governing Lawyers § 98 cmt. d (1998). Respondent points to no legitimate reason why these basic principles should not apply here.

Respondent contends (Br. in Opp. 30) the government should have obtained a "clear commitment" that Ms. Doe would not obtain an abortion procedure before the government sought a stay on the morning of October 25. Respondent's contention both ignores critical facts and is legally irrelevant. First, government counsel asked to be kept informed of the timing of Ms. Doe's procedure, and in context the response—"[a]s soon as we understand the clinic's schedule tomorrow we will let you know"—indicated that respondent's counsel would keep the government informed as to the timing of the procedure, not some mundane fact like what hours the clinic would be open. Pet. 13, 27. Second, respondent does not dispute that Ms. Doe's attorney ad litem told the government an abortion could not take place until October 26—a representation that could not have been clearer. Pet. 13. Third, after the government informed

respondent's counsel of its intentions, one of respondent's attorneys expressed relief that he would not need to "check [his] email at 2 a.m.," Resp. Ex. 1 (lodged with the Court), confirming that he knew the government was relying on his co-counsel's representations about the timing of the abortion. Even in the absence of a "direct inquiry" from opposing counsel, an attorney's silence can be equivalent to a misleading statement where it is "obvious that [the opposing party] [i]s acting under a misapprehension," 2 Geoffrey C. Hazard, Jr. et al., *The Law of Lawyering* § 40.04, at 40-13 (2015) (Hazard); see *id.* § 40.03, at 40-10, particularly where it is *the attorney's own conduct* that created the misimpression.

Respondent insists that her counsel had an obligation "zealously to protect and pursue [her] legitimate interests" and to maintain client confidentiality. Br. in Opp. 31 & n.18 (citation omitted). But "Model Rule 4.1(a) is not qualified or 'trumped' by reference to the confidentiality principle set forth in Rule 1.6." Hazard § 40.03, at 40-12; see *id.* § 40.03, at 40-10 (The "view that confidentiality is absolute" is "discredited," "goes too far, and is contrary to * * * the law of lawyering."). To be clear, the government is not arguing that respondent's counsel had "a duty to forbear from effectuating" the district court's amended TRO as rapidly as possible. Br. in Opp. 30. Rather, they had a duty not to inform the government (and otherwise lead the government to believe) that the court's order could not be effectuated before October 26; know that the government was relying on those representations; and then actively work to render those representations false in order to prevent this Court's review.

To take an analogous example, consider if government counsel informed opposing counsel that the unavailability of a particular drug would prevent the government from carrying out an execution until some future date, but after learning that the prisoner planned to file an emergency stay application, government counsel undertook extraordinary efforts to obtain the drug and to carry out the execution sooner without notice to opposing counsel. The conduct would be no more becoming a member of the Bar of this Court because the government's statements to counsel were accurate when made, see Br. in Opp. 23; the government never "forsw[o]r[e]" a different course of action, see *id.* at 25; and nothing prevented counsel from extracting more explicit commitments rather than taking the government at its word, see *id.* at 29. Members of the Bar of this Court, particularly in the context of emergency proceedings, often rely on—and should be safe in relying on—the duty of counsel to update statements that have become materially false, let alone as a result of counsel's own conduct.

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For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted, the judgment of the court of appeals should be vacated, and the case should be remanded to the court of appeals with instructions to remand to the district court for dismissal of all of Ms. Doe's claims for prospective relief regarding pregnant unaccompanied minors.

Respectfully submitted.

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